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Supreme Court, U.S.
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Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2003

IN THE MATTER OF
BOBBY MARSHALL ZIDELL
PETITIONER

V

UNITED STATES OF AMERICA
RESPONDENT

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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67 pp

QUESTIONS PRESENTED

1. Is Venue A Jurisdictional Element?

2. Does the Constitution and Statues Provide three unwaiveable Protections on Venue?

3. Is a single stand alone count, that is not a conspiracy qualify under the continuing offense statue 18 U.S.C. 3237?
A) There is a split in the Circuits.

4. Does the Sixth Circuit "Substantial Contacts" Inquiry violate the Constitution and Statues?

5. Is an attempt charge a continuing offence?

6. Is Venue an issue of great practical importance that is recurring, which the Circuits are split on?

7. Constructive possession recurs Venue in Texas.

8. Does aiding and abetting theory grant Venue?

LIST OF PARTIES
RULE 14.1 STATEMENT

THE PARTIES TO THE PROCEEDINGS ARE:

BOBBY MARSHALL ZIDELL	PETITIONER
JULIA S. GIBBONS	DISTRICT JUDGE
THOMAS L. PARKER	ASST. UNITED STATES ATTORNEY
THOMAS EDWARDS HANSON	PETITIONER'S COUNSEL
MOORE - GILMAN - ROSEN	SIXTH CIRCUIT JUDGES

TABLE OF CONTENTS

PAGE

Questions Presented i
Rule 14.1 Statement ii
Table of Contents iii
Table of Authorities iv
Opinions Below 1
Jurisdiction 1
Constitution and Statutory Provisions Involved 1
Statement of the Case 2
Questions Presented
1. Is Venue a Jurisdictional Element? 3
2. Does the Constitution and Status provide three unwaivable Protections on Venue?..... 4
3. Is a single stand alone count, that is not a conspiracy qualify under the Continuing offence status. 18 U.S.C. 3237?..... 5
4. Does the Sixth Circuit "Substantial Contacts" inquiry violate the Constitution and statues on Venue?.....6
   A) There is a split in the Circuits.....6
5. Is an attempt charge a continuing offense?.....7
6. Is Venue an issue of great practical importance that is recurring, which the Circuits are split on?.....8
7. Constructive Possession requires Venue in Texas.....9
8. Does aiding and abetting theory grant venue?.....9

Conclusion 10
Footnotes 10

TABLE OF AUTHORITIES

Supreme Court Cases PAGE

Ruhr Gas Ag. v. Marathon Oil, 526 US 574 (1999).....3
United States v. Cabrales, 524 US 1 (1998) 3,8
United States v. Rodrique-Moreno, 526 US 275 (1999).....3
Pereira v. United States, 347 US 1 (1954) 5
Penkerton v. United States, 347 US 640 (1954).....5
United States v. Anderson, 328 US 699 (1946) 5
Travis v. United States, 364 US 631 (1961) 7

Circuit Cases

United States v. Winship, 724 F2d 1116, 1124 (5th Cir. 1984) 4
United States v. Kupatrick, 458 F2d 864 (7th Cir. 1972) 6
United States v. Bozza, 365 F2d 206 (2nd Cir. 1966) 6
United States v. Medina-Ramos, 834 F2d 874 (10th Cir. 1987)..... 6,8,9
United States v. Delgado, 914 F2d 1062 (8th Cir. 1990) 6,8
United States v. Georgacarakos, 988 F2d 1289 (1st Cir. 1993).....6
United States v. Reed, 773 F2d 477, 480 (2nd Cir. 1985)..... ..7
United States v. Uribe, 890 F2d 554, 559 (1st Cir. 1989).....8
United States v. Medina, 992 F2d 573, 587 (6th Cir. 1993) 8
United States v. Stitzer, 785 F2d 1506, 1519 (11th Cir. 1986).....8
United States v. Baskins, 886 F2d 383, 388 (D.C. Cir. 1989).....8
United States v. Davis, 666 F2d 195 (5th Cir. 1986) 8
United States v. Batista-Volanco, 927 F2d 14, 18-19 (1st Cir. 1987)...8

Federal State Cases

United States v. Harmon, 1:98-CR-92, 2-3-99 (E.D. Tenn) 4

Constitution, Statues, Rules

28 U.S.C. 1254 (1).....1
18 U.S.C. 3237(a) 1, 5, 8
21 U.S.C. 841 .....3, 8
21 U.S.C. 846.....7
18 U.S.C. 2 9
14 Amendment of the United States Constitution 2
6 Amendment Sec 2 Clause 3, US Constitution 1, 2, 4

TABLE OF AUTHORITIES CONTINUE:

Miscellaneous
Rule 18 Fed Rules of Criminal Procedures 1, 2, 4
Norman Abrams, Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula, 9 UCLA L. Rev 751, 774 (1962) 4
2 Charles Alan Wright, Federal Practice and Procedure: Criminal 2nd (1982), 302@ 201.....7

BRIEF OF PETITIONER

OPINIONS BELOW

The Sixth Circuit Court of Appeals Decision is (Appendix -1); The Judgment and commitment order of the Western District of Tennessee Memphis Division is (Appendix -2);. Zidell's Notice of Appeal is (Appendix-3);

JURISDICTION

The decision sought to be reviewed (Appendix - 1), was entered by the United States Court of Appeals for the Sixth Circuit on March 21, 2003. 'This Court has Jurisdiction to review (Appendix - 1) Under 28 U.S.C. 1254 (1).

CONSTITUTIONAL, STATUATORY PROVISIONS INVOLVED

The relevant provisions of the Sixth Amendment is (Appendix- 4); Section 2, Clause 3 of the Constitution is (Appendix-5); Rule 18 of the Federal Rules of Criminal Procedure is (Appendix-6); the Continuing Offense Statue 18 U.S.C.3237(a).

STATUTES INVOLVED

Congress enacted 18 U.S.C. 3237(a) for the purpose of "Any offense against the United States begun in one district and completed in another, or committed in more than one district, may be . . . prosecuted in any district in which such offense was begun, continued, or completed."

The statue in para materia with Amendment 6 (Appendix -4), Section 2, Clause 3 of the Constitution (Appendix -5) and Federal

Rules of Criminal Procedure Rule - 18 (Appendix - 6) work to protect Zidell's rights to be tried in the correct District.

Due Process Consideration's Emodied in the Sixth (Appendix - 5) and Fourteenth Amendment (Appendix - 6) point clearly to an interpretation that favors Zidell.

Despite the attempts of the lower Courts to disregard these rights, and to have a split in the Circuits, leaves this court with the job it has been appointed to carry out and that is to settle this issue.

STATEMENT OF THE CASE

Zidell was indicted on September 29, 1999 in the United States District Court Western District of Tennessee Memphis Division case no. 99-20231 in a (2) two count Indictment.

On January 19, 2000 Zidell was charged in a superseding indictment. (Appendix -7) Count-One along with Bobby Smith and Kevin Cranford, with conspiring in the period of March 1998 to April 8, 1999 to possess with intent to distribute an amount in excess of 1 kilogram of a mixture and substance containing a detectable amount of methamphetamine, Count Two charged that from April 1 to April 8, 1999, Zidell and Cranford Attempted to Possess with Intent to Distribute approximately 1 pound of a mixture or substance containing a detectable amount of methamphetamine.

Zidell went to trial on July 10, 2000 and on July 27, 2000 the jury found Zidell guilty of Count One and Count Two.

At the close of the Governments Proof, Zidell's attorney made a motion for a judgment of Acquittal and stated " . . . on both counts of the indictment . . . make out each and every element . . ."

At the close of evidence, Zidell's attorney again renewed it's motion for a judgment of Acquittal.

On appeal this issue is III in (Appendix - 1).

QUESTIONS PRESENTED

(1)

IS VENUE A JURISDICTIONAL ELEMENT?

Certainly if Venue was not had in the Western District of Tennessee then the court was without jurisdiction either over the subject matter or over Zidell's person.[1]

Further Congress did not insert a Venue provision in 21 U.S.C. 841 to provide a method for determining Venue. Therefore the Statue cannot be used for a Jurisdictional Element.

Count Two of Zidell's indictment charges from April 1, 1999 to April 8, 1999 which is not an essential element of Count One the Conspiracy Count, and Count Two was not incorporated in Count One nor did Count Two incorporate Count One. Thus, even though the Conspiracy Offense is in the Western District of Tennessee, Zidell did not commit any part of Count Two from April 1, 1999 to April 8, 1999 in the Western District of Tennessee, thereby jurisdiction is lacking.

The conclusion that Venue is a jurisdictional element, and is limited to the place where the essential conduct elements occur's, with out regard to the place where other essential elements of the crime occur, is completed by the Supreme Courts two recent decisions.[2]

Therefore the Western District of Tennessee was without the necessary Jurisdiction element to prosecute Count Two of Zidell's indictment.

(2)

DOES THE CONSTITUTION AND STATUE'S PROVIDE THREE UNWAIVABLE PROTECTIONS ON VENUE?

Article 3 Section 2 Clause 3 (Appendix -5) in Pertinent Part states "The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . " Sets forth that this is a Jurisdictional element, and the fact is jurisdiction cannot be waived. The fact that the Sixth Circuit spent 60% of its decision on this one issue is evidence that this is of particular interest, and not waivable.

Amendment VI of the Constitution (Appendix -4) in pertinent part states "In all criminal prosecutions the accused shall enjoy the right . . . by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . " only reinforces Article 3 Section 2 Clause 3 (Appendix5).

Federal rules of criminal procedure Rule 18 (Appendix -6) in pertinent part states " . . . prosecution shall be had in a district in which the offense was committed . . . " Further reinforces a Jurisdictional right that cannot be waived.

The fact is in the Sixth Circuit [3] the rule is "Whether the elements of a valid waiver are present is beside the point" and it cannot be waived, it is a constitutional right.

These statues and constitutional rights on Venue were barriers that were placed to prevent the government from trammeling Zidell's Venue rights [4].

Thus the strong potential for the prosecution to choose from is narrowed by the substantive counts the government wishes to prosecute [5]. If this is so then surely Zidell could not waive this issue.

(3)

IS A SINGLE STAND ALONE COUNT, THAT IS NOT A CONSPIRACY QUALIFY UNDER THE CONTINUING OFFENSE-STATUE 18 U.S.C. 3237?

Count Two of Zidell's indictment (Appendix-7) charges that from April 1, 1999 to April 8, 1999 Zidell and Cranford Attempted to Possess with Intent to Distribute approximately 1 pound of a mixture or substance containing a detectable amount of methamphetamine.

Trial testimony shows that between April 1, 1999 to April 8, 1999 that Zidell was never in the state of Tennessee (Transcript 7-25-2000 page 272 - 276 Cranford; 7-24-2000 page -146 Rook) and that the 1 pound already in the indictment was sold to them on April 7, 1999 in Dallas by Zidell, and on April 8, 1999 Cranford and Rook were stopped driving in Hopkins County Texas on the way back to Tennessee with the 1 pound (Trial transcript same pages).

The law is well settled that commission of a substantive offense and a conspiracy to commit it are separate crimes. Thus the offense in Count Two require proof not essential to Count One the conspiracy. (6)

Count Two then requires the locus delicti must be determined from the nature of the crime alleged, and the location of the act or acts constituting it. (7)

If the governments argument is correct, That a possession crime is a continuing offense (which Zidell does not agree with) then the only location of act's, and the nature of the crime was in the State of Texas between April 1, 1999 to April 8, 1999.

The offense during the period of April 1, 1999 to April 8, 1999 began in Dallas Texas, Northern District of Texas and completed in Hopkins County Texas Eastern District of Texas. Nowhere touching the state of Tennessee.

Further, Zidell being charged with Aiding and Abetting in this Count cannot help the government, for the law is that an Aider and Abetter may be punished as a principle, and punished in the same District as the principle. [8] The principle on April 8, 1999 was found in possession in Hopkins County Texas where the 1 pound possession ended.

The provision for trial in the vicinity of the crime was to protect Zidell from the hardship and unfairness incident to a trial conducted in a remote place. Here Venue could be placed in the Northern or Eastern District of Texas.

(4)

DOES THE SIXTH CIRCUIT "Substantial Contacts" INQUIRY VIOLATE THE CONSTITUTION AND STATUES ON VENUE?

The Sixth Circuits "Substantial Contacts" Inquiry is:

1. Site of defendants acts
2. Elements and nature of the crime
3. The locus of the effect of the criminal conduct
4. Suitability of each District for fact finding

Whereas other circuits have stated that under statue mailing it unlawful to knowingly possess with intent to distribute a controlled substance, location at which acts constituting possession occur is location at which crime is committed for Venue. [9]

Only actions by the defendant which constitute either distributing or possessing with intent to distribute are probative in determining offenses.[10]

(A)

THERE IS A SPLIT AMONG THE CIRCUIT

Venue as shown in the Sixth Circuit "Substantial Contacts" footnote (9) and (10) show a split.

The Supreme Court has yet to articulate a current definition of the underlying policies of Venue. This lack of definition was noted by Justice Hanan in his dissent in Travis. (11)

This Court needs to settle this dispute among the Circuits, and lay to rest the Circuits pot shots at this Courts lack of articulation. (12)

Judge Learned Hand reversed a conviction and dismissed an indictment on the grounds that the substantive crime was committed altogether in Manhattan and the prosecution was in Brooklyn.

Zidell's substantive crime Count Two from April 1, 1999 to April 8, 1999 was committed altogether in Texas and the prosecution was in Tennessee.

The fact is, the attempt to lay Venue in Tennessee, while not altering the substantive offense would be invalid. (13)

The Sixth Circuit's use of Aiding and Abetting and the words attempt Zidell will address as a moot issue further on in this writ.

(5)

IS A ATTEMPT CHARGE A CONSTITUTIONAL OFFENSE?

Attempt may be listed in 21 U.S.C. 846, however it is not a conspiracy.

Blacks law list attempt as having four (4) elements. However only number three is worth discussing. That is failure of consummation. Between April 1, 1999 and April 8, 1999 pursuant to the indictment, and the amount on April 7, 1999, Zidell, had possession of 1 pound of a mixture or substance containing a detectable amount of methamphetamine. On April 7, 1999 Zidell possessed and distributed the 1 pound.

Therefore if attempt is a continuing offense then possession with intent began, continued and was completed all in Texas

First the drugs never reached Tennessee.

Second there is no proof that Zidell, knew the drugs were going to Tennessee or that Zidell agreed for the drugs to go to Tennessee.

There is numerous states, cities and towns, from all directions of Dallas. The fact of the matter is being stopped in Hopkins County Texas does nothing to prove that Cranford and Rook were traveling to Tennessee.

(6)

IS VENUE AN ISSUE OF GREAT PRACTICAL IMPORTANCE THAT IS RECURRING, WHICH THE CIRCUITS ARE SPLIT ON?

Where a defendant is charged with more than one crime Venue must be proper with respect to each count. (14)

In Count - Two there is no proof that Zidell had ability or authority to exercise control over the 1 pound of methamphetamine if it ever got to Tennessee.

Moreover there is no evidence that any co-conspirators possessed the methamphetamine in Tennessee.

Venue raises deep issues of public policy, constitutional and statutory guarantees.

With 21 U.S.C. 841 being a continuing offense under 18 U.S.C. 3237 in some Circuits and not in others is unequal application of the law. (15) That is if Zidell was in the Fifth, Eighth or Tenth Circuits his appeal would have been granted as to Count Two Venue.

Therefore, the deep issues of Constitutional and Statutory guarantees is being eroded based upon the Circuit a case is heard in, and is recurring on a Circuit by Circuit basis.

For this reason alone this Court has authority to assure equal

application of Venue.

(7)
CONSTRUCTIVE POSSESSION REQUIRES VENUE IN TEXAS

Illegal possession of drugs can be actual or constructive, sole or joint. The typical constructive possession case in criminal law is where the defendant and the object are in the same jurisdiction, but the defendant does not have the object in hand, and indeed may try to disclaim ownership or possession. (16)

Here, Cranford and Rook had possession of the methamphetamine in Texas, which was Zidell's location, thereby since Zidell did not possess the contraband, then only constructive possession could apply to this crime.

As *Medina-Ramos* (16) stated considering constructive possession and Venue, and determining that the acts and ability giving rise to constructive possession of contraband can only take place where the possessor is physically present. That is Rook and Cranford were in Texas.

Therefore under constructive possession theory only the Eastern District of Texas had Venue over Count Two.

(8)
DOES AIDING AND ABETTING THEORY GRANT VENUE?

The indictment (Appendix -7) Count-Two uses the words "Attempted to cause the possession . . . " citing 18 U.S.C. 2, the government alleges that Zidell aided and abetted Cranford and Rook, to possess, that is between April 1, 1999 to April 8, 1999.

Nether Cranford, Rook or the methamphetamine ever reached Tennessee. (See *Delgado* @ 15)

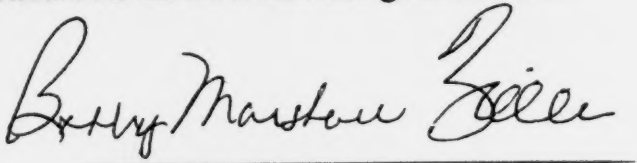
Further the law of aiding and abetting is " one who has never been physically present in a district, may nonetheless be prosecuted there for possession if he aids and abets another who has either actively or constitutively possessed a controlled substance in the jurisdiction." (16)

During the period of April 1, 1999 to April 8, 1999 Zidell certainly did not aid or abet Crandall or Rook in one pound of methamphetamine by constructive possession in Tennessee.

Therefore aiding and abetting theory could not grant Venue in Tennessee since the one pound never made it to Tennessee.

CONCLUSION

The split in the Circuits on Venue and the deep issue of Public Policy and Constitutional and Statutory concerns demands that this court exercise its jurisdiction over Zidell's case and grant the writ.



Bobby Marshall Zidell

FOOTNOTES:

1. *Ruhr Gas AG. v. Marathon Oil,* 526 US 574 (1999)
2. *United States v. Cabrales*, 524 US 1 (1998)
   United States v. Rodrigue-Moreno, 526 US 275 (1999)
3. *United States v. Harmon,* 1:98-CR-92, 2-3-99(E.D. Tenn)
4. *United States v. Winship,* 724 F2d 1116, 1124 (5th Cir. 1984)
5. Norman Abrams, Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula, 9 UCLA L. Rev 751, 774 (1962)
6. *Pereira v. United States,* 347 US 1 (1954)
   Penkerton v. United States, 328 US 640 (1946)
7. *United States v. Anderson*, 328 US 699 (1946)
8. *United States v. Kupatrick,* 458 F2d 864 (7th Cir. 1972)
   United States v. Bozza, 365 F2d 206 (2nd Cir. 1966)

9. *United States v. Medina-Ramos,* 834 F2d 874 (10th Cir 1987)
   United States v. Delgado, 914 F2d 1062 (8th Cir. 1990)
10. *United States v. Georgacarakos,* 988 F2d 1289 (1st Cir. 1993)
11. *Travis v. United States*, 364 US 631 (1961)
    United States v. Reed, 773 F2d 477, 480 (2nd Cir. 1985)
12. *Reed,* @ 480
13. 2 Charles Alan Wright, Federal Practice and Procedure: Criminal 2nd (1982), 302 @ 201
14. *United States v. Cabrales*, 524 US 1 (1998)
15. **Compare Continuing Crime:**
    United States v. Uribe, 890 F2d 554, 559 (1st Cir. 1989)
    United States v. Medina, 992 F2d 573, 587 (6th Cir. 1993)
    United States v. Stitzer, 785 F2d 1506, 1519 (11th Cir. 1986)
    United States v. Baskins, 886 F2d 383, 388 (D.C. Cir. 1989)
    With: It Is Not a Continuing Crime:
    United States v. Davis, 666 F2d 195 (5th Cir. 1986)
    United States v. Delgado, 914 F2d 1062 (8th Cir. 1990)
    United States v. Medina-Ramos, 834 F2d 874, 877 (10th Cir. 1987)
16 *Medina-Ramos,* @ 874, 876
    United States v. Batista-Volanco, 927 F2d 14, 18-19 (1st Cir. 1991)